80-598

No. _____

Supreme Court, U. S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

David W. Joly, Assistant Principal
Quincy Public Schools, Quincy,
Massachusetts (Petitioner)

v.

Lawrence P. Creedon, Superintendent
Quincy Public Schools, Quincy,
Massachusetts (Respondent)

Petition for a Writ of Certiorari to the

United States Court of Appeals

For the First Circuit

Represented by:

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States: David W. Joly, Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 16, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Relationship between Federal courts

and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights as guaranteed by the Federal constitution and Federal statutes.

2. Equal protection clause of fourteenth amendment relative to procedural differences in administrative hearings and judicial hearings concerning an individual's rights as guaranteed by the Federal constitution and Federal statutes.

3. Requirements of due process relative to "liberty" specifically, denial of hearing to address the question of "stigma."

4. Individual's right to interstate travel in pursuit of his profession without "stigma" created by written material in individual's personnel file.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Invoked	1
Statement of the Case	2
Reasons for Granting Writ	9
Conclusion	15
Appendix	
1. Judgment Sought to be Reviewed	16
2. Unpublished Opinion of Appeals Court	17
3. Judgment of District Court	24

CITATIONS

Cases:

Acanfora v. Board of Education of Montgomery County, 491 F 2d 498, Certiorari denied (1973)	13
Barry v. Barchi, 443 U.S. 55, 61 L Ed 2d 365, 99 S CT 2642 (1979)	12
Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 55 L Ed 2d 252, 98 S CT 1042 (1978)	11
Dunlop v. Backowski, 421 U.S. 560, n7, 568-574, 44 L Ed 2d 377, 95 S CT 1851 (1975)	12
Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute 566 F 2d 289, Certiorari denied	13
Goldberg v. Kelley, 397 U.S. 254, 264, 25 L Ed 2d 287, 90 S CT 1011 (1970)	14
Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L Ed 2d 338, 91 S CT 1790 (1971)	14
Huntly v. Community School Board of Brooklyn, NY, 543 F 2d 979 (1976)	13
Linda R.S. v. Richard D., 410 U.S. 614, 35 L Ed 2d 536, 93 S CT 1146 (1973)	12

Page

Magans v. Lavine, 415 U.S. 528, 94 S CT 1372 (1974) 12

Moog Industries Inc. v. F.T.C., 355 U.S. 411, 414, 2 L Ed 2d 370, 78 S CT 377 (1958) 12

Mt. Health School District Board of Education v. Fred Doyle, 402 U.S. 274, 50 L Ed 2d 471, 97 S CT 568 (1977) 11

United States v. Guest, 383 U.S. 745, 757-758, 16 L Ed 2d 239, 86 S CT 1170 (1966) 14

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in the appendix hereto. The unpublished opinion of the District Court appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 16, 1980, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment (Due Process, Equal Protection and Property Rights)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 28 Section 1343(3).
Civil rights and elective franchise.

"To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

United States Code, Title 42 Section 1983.
Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT OF THE CASE

Petitioner Joly brought suit in the U.S. District Court for the District of Massachusetts,

against Respondent Creedon seeking to obtain a declaratory judgment.

Petitioner, David W. Joly (etc.), who is and was at all times relevant hereto a public school teacher for twenty-three years and has been, since 1967, an Assistant Principal in the Quincy Public School System, Quincy, Massachusetts.

Respondent, Lawrence P. Creedon (etc.), is and has been since 1966 the superintendent of schools for the City of Quincy, Massachusetts, is Chief Executive Officer and Constitutional Officer of the Quincy Public School System with responsibilities for overseeing the instructional, administrative and financial activities of the said school system.

The Petitioner, in his capacity, has served in the same school building under three principals for ten years; performing a specific classroom activity that was classified, by three principals, as within the framework of prescribed subject matter. The above specific classroom activity had previously been approved by the

Respondent for use in the Quincy Public School System.

The Petitioner received a letter dated May 7, 1979, from his immediate supervisor (fourth principal). This letter, in part, stated, "it is unfortunate that your actions have caused unnecessary distress for students, parents, and administrative staff and for you." The above letter was placed in the Petitioner's personnel file as a permanent part of his record without benefit of a hearing.

The Petitioner received a letter dated May 8, 1979, from the Director of Elementary Education stating, in part, the following: "It is not my general practice to respond to such a letter, but I felt that the seriousness of this situation required a response from me." The above letter was placed in the Petitioner's personnel file as a permanent part of his record without benefit of a hearing.

The Respondent affirmed the action of the two above administrators, without the benefit of hearing.

On August 24, 1979, Petitioner filed a complaint in the U.S. District Court for Massachusetts seeking a Summary Judgment. On February 19, 1980, U.S. District Court for Massachusetts denied Petitioner's motion for Summary Judgment.

On February 20, 1980, the Quincy Patriot Ledger (local daily newspaper serving approximately 200,000 people) printed an account of U.S. District Court decision of February 19, 1980, which prompted certain parents to first write letters to Quincy Public School officials objecting to a "controversial" teacher (Petitioner) in a classroom with their children and the parents demanded that the Quincy School Committee meet to discuss the possible removal of the teacher (Petitioner) from the present school. The Quincy School Committee met in executive session with the abovementioned parents, Petitioner, Respondent, and Attorney for Respondent. The parents were not satisfied, the School Committee has not reached a decision on the matter, and all correspondence concerning-

the matter has been placed in the Petitioner's personnel file as a permanent part of Petitioner's record.

On March 3, 1980, the Petitioner met with representatives of the Massachusetts Teachers Association and the Quincy Education Association relative to consideration of the grievance-arbitration machinery, as suggested by the District Court Judge at the February 19, 1980, hearing.

The Petitioner was told by the above representatives that he (petitioner) was never entitled to a hearing in grievance and still is not entitled to a hearing in grievance regardless of what the Judge had to say. The above representatives stated that the contract reads "hours, wages and conditions of employment" and that is a narrow definition which will not be stretched.

The Quincy Public Schools and the Quincy Educational Association have a contractual agreement concerning the "hour," "wages," and "conditions of employment" and are the only

classifications in which a teacher may seek a redress of grievances.

The above contract ("Grievance and Arbitration Procedure") states the following:

1. "The purpose of the procedure set forth hereinafter is to produce prompt and equitable solutions to those grievances which, from time to time, may arise and affect wages, hours and conditions of employment covered by this contract."
2. "The Arbitrator shall have the authority to settle only a grievance which concerns misinterpretation or misapplication or violation of the express terms of this agreement. This Arbitrator shall have no power to add to, subtract from, or modify this agreement.

If a teacher is accused in writing of an act, defined or undefined, the teacher's only recourse is to write a letter in opposition and then both letters are placed in the teacher's

personnel file as a permanent part of the record. The only way possible to remove the accusatory letter is through the grievance procedure. If the matter is outside the confines of "hours," "wages," or "conditions of employment" the accused teacher has no forum for redress of grievances (this is the case now before the bar).

The actions taken by the Respondent against Petitioner were executed while a duly sworn constitutional officer and chief executive officer of the Quincy, Massachusetts, School System and within the framework of state statute.

Respondent is responsible for all acts against the Petitioner by the subordinates since they were acting by direction of official policies recommended and implemented by Respondent.

The Respondent has never allowed a hearing to any teacher for any reason.

On July 16, 1980, the First Circuit affirmed the judgment of the District Court in denying

Petitioner a Summary Judgment.

REASONS FOR GRANTING THE WRIT

The problems of impartial adjudicative proceedings which are inherent in this case are not restricted to Petitioner and the Quincy Public School System but are prevalent in school systems in every state in the union and affecting many thousands of teachers.

This case concerns the proper relationship between Federal courts and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights as guaranteed by the Federal constitution and Federal statutes. Specifically, the court must decide under what circumstances, concerning individual civil rights, may an individual seek redress of grievances in the Federal courts.

Since an employee's contractual rights and remedies under a collective bargaining agreement result from concessions already made by the Union as part of the economic bargain struck with the employer, no additional con-

cession may be extracted from an employee as the price for enforcing those rights.

An arbitrator having no general authority to invoke public laws that conflict with the bargain between the parties is confined to interpretation and application of the collective bargain agreement regardless of whether parts of this agreement resemble provisions of the Federal constitution or Federal statutes. An arbitrator exceeds the scope of his submission where the arbitral decision is based solely on the arbitrator's view of the requirements of enacted legislation rather than on interpretation of the collective bargaining agreement.

The doctrine of election of remedies is applicable in the present context, which involves constitutional and statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that the violation of both rights have resulted from the same factual occurrence.

Permitting an employee to resort to the judicial forum does not undermine the employer's

incentive to arbitrate but it does comport with the congressional objective that the Federal courts should exercise the final responsibility for the enforcement of provisions in the Federal constitution and statutes.

The Supreme Court has found it necessary to formulate a test for causation which distinguishes between a result caused by a constitutional violation and one not so caused. See Mt. Healthy City School District Board of Education v. Fred Doyle, 402 U.S. 274 50 L Ed 2d 471, 97 S CT 568 (1977).

Impartiality in adjudicating proceedings safeguards the two central concerns of due process, the prevention of unjustified or mistaken deprivations and the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 55 L Ed 2d 252, 98 S CT 1042 (1978). Public officials and administrative prosecutors performing judicial

or quasi-judicial functions are not applicable to those acting in a prosecutorial capacity. See Linda R.S. v. Richard D., 410 U.S. 614, 35 L Ed 2d 536, 93 S CT 1146 (1973); Moog Industries Inc. v. FTC, 355 U.S. 411, 414, 2 L Ed 2d 370, 78 S CT 377 (1958); Vaca v. Sipes, 386 U.S. 171, 182, 17 L Ed 2d 842, 87 S CT 903 (1967). In cases which the enforcement decisions of an administrator were motivated by improper facts or were otherwise contrary to law are not immune from judicial scrutiny. See Dunlop v. Backowski, 421 U.S. 560, 567, n7, 568-574, 44 L Ed 2d 377, 95 S CT 1851 (1975). When the difference between procedures concerning administrative hearings for individuals is violative or equal protection, the individual is constitutionally entitled to a hearing to meet the requirements of due process. See Barry v. Barchi, 443 U.S. 55, 61 L Ed 2d 365, 99 S CT 2642 (1979). Obviously, claims under the equal protection clause are rights secured by the constitution and laws within the meaning of 42 U.S.C.A., Section 1983. See Magans v.

Lavine, 415 U.S. 528, 94 S CT 1372 (1974).

If teacher's good name, reputation, honor or integrity is at stake because of what school administration is doing to him, notice and opportunity to be heard are essential for administrative due process. See Acanfora v. Board of Education of Montgomery County, 359 F. Supp. 843, affirmed 491 F 2d 498, certiorari denied, 95 S CT 64, 419 U.S. 836, 42 L Ed 63 (1973). Damage to reputation is not inconsequential and can qualify for procedural protection under due process clause. See Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute, 566 F 2d 289, certiorari denied, 98 S CT 3144, 438 U.S. 915, 57 L Ed 2d 1160 (1977). Charges that acting principal failed to demonstrate quality of leadership, created climate of confusion and discontent such as to stigmatize him without fair hearing and deprived him of "liberty" in violation of his due process rights. See Huntly v. Community School Board of Brooklyn, New York, District No. 14, 543 F 2d 979 (1976).

Petitioner's personnel file contains numerous documents that rightfully restrict employment possibilities in other school systems in and out of the state of Massachusetts and prevent Petitioner from pursuing his profession and thereby restricting interstate travel. His personnel file contains items such as District Court documents, Court of Appeals documents, parent letters concerning court action and documents relative to Quincy School Committee meeting concerning the removal of Petitioner from his current academic assignment. The court should examine, as it has done in the past, whether the result of actions erects a real and purposeful barrier to movement. See Goldberg v. Kelley, 397 U.S. 254, 264, 25 L Ed 2d 287, 90 S CT 1011 (1970). The constitutional right of interstate travel is virtually unqualified. See United States v. Guest, 383 U.S. 745, 757-758, 16 L Ed 2d 239, 86 S CT 1170 (1966); Griffin v. Breckenridge, 403 U.S. 88, 105-106, 29 L Ed 2d 338, 91 S CT 1790 (1971).

Finally, the correctness of the decision

below is open to serious question. The record shows quite plainly that the trial judge admitted that Petitioner never received a hearing and the trial judge based his decision to deny Petitioner a Summary Judgment, in part, because of the effect it may have on all public employees throughout our nation. It appears that the First Circuit concurred with the trial as to the effect a Summary Judgment could have nationally. The above rationale cannot be justified and certainly cannot be justified by the time honored consideration of fairness.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and unpublished opinion of the First Circuit.

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October 10, 1980

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 80-1181.

DAVID W. JOLY,
Plaintiff, Appellant,

v.

LAWRENCE P. CREEDON,
Defendant, Appellee.

JUDGMENT

Entered: July 16, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district is affirmed.

By the Court:

DANA H. GALLUP
Clerk

By /s/Francis P. Scigliano
Chief Deputy Clerk

(cc: Messr. Goldfarb and Ms. Tate.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 80-1181

DAVID W. JOLY,
Plaintiff, Appellant,

v.

LAWRENCE P. CREEDON,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. W. Arthur Garrity, Jr., U. S. District Judge)

Before

Campbell and Bownes, Circuit Judges,

and Boyle,* District Judge.

Jerry A. Goldfarb, with whom David W. Joly was on brief, for appellant.
Regina Williams Tate, with whom Murphy, Lamere & Murphy was on brief, for appellee.

July 16, 1980

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* Of the District of Rhode Island, sitting by designation.

CAMPBELL, Circuit Judge. Plaintiff David W. Joly, a Quincy, Massachusetts, public school-teacher, appeals from the dismissal of his 42 U.S.C. Section 1983 complaint for failure to state a claim upon which relief can be granted. Plaintiff contends he was denied procedural due process when Quincy school authorities placed two letters in his personnel file criticizing him for a classroom incident without affording him a prior hearing. The district court dismissed the complaint for failure to allege deprivation of a constitutionally protected property or liberty interest sufficient to trigger a due process hearing requirement.

On May 7, 1979, the principal of the elementary school where Joly teaches and serves as assistant principal sent Joly a letter concerning an incident that occurred in Joly's classroom on May 3. According to the letter, Joly permitted the class to vote on which students in the class did not get along well with others. Two students were singled out for criticism and comment on their inability to

get along. The letter stated, in part, "You have subjected children to public embarrassment, violated good pedagogical theory and acted in opposition to the Quincy Public Schools goal of 'humane treatment of little folk.'" In accordance with the collective bargaining contract between the school system and the teachers' organization, this letter was sent to Joly for him to read and sign before it was placed in his personnel file. The contract also ensured Joly the right to respond in writing to the letter, and to have his response placed in his file alongside the letter criticizing him.

On May 8, 1979, Joly was sent a second letter, this one from the director of Elementary Education, Wilfred Nolan. This letter stated that Nolan had reviewed the earlier letter and that he was "in complete agreement" with the principal's actions. "It is inconceivable that a teacher would ever set up a classroom situation which would result in public embarrassment to any student member of the classroom," the

letter said. Nolan also stated in the letter that he was "distressed" by Joly's refusal either to read or sign the letter sent him by the principal, since under the agreement the teacher's signature on such a letter would not indicate agreement with its contents.

The record also contains an undated letter from Joly to Nolan responding to certain statements contained in the two earlier letters. In his letter, Joly did not dispute the administrators' version of the underlying facts. He did state that "the practice he (Joly) has been accused of by the Principal has been accepted by three previous Principals during the past ten years at this school." Joly also defended his judgment in employing the particular practice: "The program is sound and within the framework of the prescribed subject matter." The letter ended with the statement that Joly "feels that perhaps this matter should be brought in front of a federal judge for adjudication."

During appellate argument, plaintiff

abandoned the contention that placement of the two letters in his file deprived him of a protected property interest. He was well advised to do so. Plaintiff was not fired, demoted, or denied a position to which he was entitled. His salary was not affected. No position or benefit to which he was entitled was taken away. A protected property interest is limited to an interest to which the individual concerned has a legitimate claim of entitlement. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

Joly argues, however, that he has a protected "liberty" interest in preventing derogatory material from being placed in his permanent personnel file. We do not think this claim can be sustained in the circumstances of this case. To begin with, plaintiff has not asserted that the allegedly "stigmatizing" material in the letters has been, or will be, made public, even to a prospective employer. The collective bargaining agreement explicitly limits

access to a teacher's personnel file to the teacher himself, the current principal, members of the school committee, members of the teachers association personnel committee, and a limited number of supervisory administrators. The Supreme Court has indicated that a person is not "stigmatized" so as to infringe a protected liberty interest unless the charges against that person are made public. Bishop v. Wood, 426 U.S. 341, 348-49 (1976); cf. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

Furthermore, plaintiff does not dispute the occurrence of the classroom incident mentioned in the two letters. The dispute is over whether what he did amounted to good teaching practice. The Supreme Court has indicated that where a public employee claiming only a liberty interest does not contest the factual predicate of material placed in his personnel file, there is literally nothing to hold a due process hearing about. Codd v. Velger, 429 U.S. 624, 627 (1977). Here, any interest of Joly's in rebutting the opinions expressed by his superiors

and offering his own justification for what he did, was adequately protected by his right to respond in writing and to have that response included in his file. Due process requires no more.

Affirmed; costs to appellee.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DAVID W. JOLY, Plaintiff	)	
vs.	)	CA 79-1709-G
LAWRENCE P. CREEDON Defendant	)	

JUDGMENT

GARRITY, J.

In accordance with the Court's allowance of defendant's motion to dismiss, after hearing on February 19, 1980, it is ORDERED:

that the case be, and it is hereby, dismissed.

By the Court:

STEPHEN A. MOYNAHAN, JR.
Deputy Clerk

Dated: February 19, 1980